Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA,

Petitioner,

vs.

THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR P.J. MORGAN, successor to MAYOR BERNIE SIMON; STEVE EXON; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; LEE TERRY; RICHARD TAKECHI; and SUBBY ANZALDO, all as Council Members of the City of Omaha,

Respondents.

Petition For Writ Of Certiorari To The Nebraska Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE NEBRASKA COURT OF APPEALS ERRED IN CONCLUDING THAT PETITIONER SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY NEBRASKA LACKED STANDING TO CHALLENGE THE ANNEXATION STATUTE PURSUANT TO THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO VOTE AND UNDER THE FEDERAL VOTING RIGHTS ACT.

2. WHETHER THE NEBRASKA COURT OF APPEALS ERRED IN CONCLUDING THAT THE INDIVIDUAL RESIDENTS' CHALLENGE OF THE ANNEXATION UNDER THE VOTING RIGHTS ACT AND THE U.S. CONSTITUTION WAS NOT RIPE FOR JUDICIAL DETERMINATION AND ADJUDICATION.

3. WHETHER THE ANNEXATION OF SID 210 BY THE CITY OF OMAHA VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION AS WELL AS THE FEDERAL VOTING RIGHTS ACT.

4. WHETHER THE COURT OF APPEALS DENIED PETITIONER DUE PROCESS OF LAW BY REFUSING TO CONSIDER CONSTITUTIONAL CHALLENGES TO THE NEBRASKA ANNEXATION STATUTE NEB. REV. STAT. § 14-117 AND OMAHA CITY ORDINANCE NO. 31294 ANNEXING SID 210 PURSUANT TO THE ANNEXATION STATUTE.

PARTIES

Petitioner

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation;

The original petition also included the following Plaintiffs:

RUTH FORBES, an individual;

PAULA WEEKLY, an individual;

Respondents

THE CITY OF OMAHA;

MAYOR P.J. MORGAN, successor to MAYOR BERNIE SIMON; STEVE EXON; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; LEE TERRY; RICHARD TAKECHI; and SUBBY ANZALDO, all as Council Members of the City of Omaha;

The initial Petition filed in this matter also named as defendants:

MAYOR BERNIE SIMON, WALTER CALINGER, FRED CONLEY, JOSEPH FRIEND, STEVE TOMASEK, JAMES CLEARY, RICHARD TAKECHI, and AL DINZOLE, all as Council Members of the City of Omaha;

The First Amended Petition also named VICKIE EDWARDS, THE ELECTION COMMISSIONER OF DOUGLAS COUNTY, NEBRASKA as a defendant. The District Court sustained defendant Edward's demurrer

PARTIES – Continued

and motion for partial summary judgment to the Petition on the grounds that the Plaintiffs lacked standing to sue on the issue of voting rights.

Intervenors

In the original action the following parties intervened in the proceedings:

SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, a Public Corporation;

ROBERT L. VANVRANKEN, an individual.

Other Parties

Because the constitutionality of a statute of a State is being called into question, 28 U.S.C. § 2403(b) may be applicable and a copy of this Petition will be served upon Don Stenberg, the Attorney General for the State of Nebraska.

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SUPREME COURT OF THE STATE OF NEBRASKA:

The order of the Nebraska Supreme Court denying Petitioner's Petition for Further Review and Brief is unreported and appears in Petitioner's Appendix. (App. 29).

NEBRASKA COURT OF APPEALS:

The opinion of the Nebraska Court of Appeals is unreported. A copy of the opinion rendered by the Court of Appeals appears in Petitioner's Appendix. (App. 1).

DISTRICT COURT for DOUGLAS COUNTY, NEBRASKA, ROBERT V. BURKHARD, JUDGE:

The opinion of the District Court for Douglas County, Nebraska is unreported. A copy of the opinion by the District Court appears in Petitioner's Appendix. (App. 15). A copy of the District Court's Order sustaining defendant Edward's Demurrer and Defendant City of Omaha's Motion for Partial Summary Judgment is found in the Appendix. (App. 27).

JURISDICTION

Petitioner seeks review by Writ of Certiorari pursuant to Article III of the United States Constitution; 28 United States Code 1257 (a); and Rule 12 of the Rules of the Supreme Court of the United States of America.

1. Petitioner seeks review of the opinion of the Nebraska Court of Appeals decision filed

December 20, 1994 and all orders related thereto.

2. Petitioner's Petition for Further Review and Brief filed January 19, 1995 denied by the Nebraska Supreme Court March 15, 1995.

CONSTITUTIONAL PROVISIONS

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

42 United States Code § 1973a(a) is set forth in Petitioner's Appendix. (App. 73).

42 United States Code § 1973c is set forth in Petitioner's Appendix. (App. 74).

NEBRASKA STATUTES

Neb. Rev. Stat. § 14-117

The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, and may include, annex, merge or consolidate with such metropolitan city, by such extension of its limits, any adjoining city of the first class having less than 10,000 population or any adjoining city of the second class or village; Provided, that any other laws and limitations defining the boundaries of cities or villages or the increase of area or extension of limits thereof, shall not apply to lots, lands, cities or villages annexed, consolidated or merged under this section. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural land which are rural in character.

Neb. Rev. Stat. § 25-21,159

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

CITY OF OMAHA ORDINANCE

Ordinance No. 31294: A copy of the Ordinance is set forth in Petitioner's Appendix. (App. 49-51).

STATEMENT OF THE CASE

The underlying facts, drawn from Petitioner's Second Amended Petition and the Orders of the courts below, may be succinctly stated as follows:

Sanitary and Improvement District No. 210 of Douglas County, Nebraska ("SID 210") is a community of approximately 2000 residents located near Boys Town, west of the corporate limits of the City of Omaha. SID 210 encompasses a Residential subdivision known as Wycliffe, and is comprised of 166 acres of land, including approximately 500 homes, with developed streets and

sewers. SID 210 was formed more than twenty years ago under Nebraska Statutes which authorize the formation of corporate entities to do such things as install electric service lines and conduits, sewer systems, water systems, a civil defense warning system, system of sidewalks, public streets and highways, contracting for fire and police protection, and acquiring, improving and operating public parks, among other potential powers and duties.

After SID 210 incorporated in 1970, the residents of SID 210 elected a board of trustees as a governing body (much like the Omaha City Council). The board of trustees levy and collect taxes, plan for and make public improvements, make arrangements for police and fire protection, maintain and operate the streets and sewers in SID 210, and enter into contracts and other obligations for the benefit of the community.

In July of 1987, the City Council of Omaha passed Ordinance No. 31294 which purported to annex SID 210 and SID 230, an adjacent subdivision commonly known as Piedmont, pursuant to Neb. Rev. Stat. § 14-117 SID 230 did not resist the annexation and were intervenors in the original action. SID 230 has since been incorporated into the City of Omaha. If annexed, SID 210 would also cease to exist as a corporate entity and body politic, and become part of Omaha.

SID 210 challenged the annexation Ordinance by petitioning the District Court for Douglas County, Nebraska, for a declaratory judgment that the Ordinance and purported annexation were and are unconstitutional

and void because it deprives the residents and community of SID 210 due process and equal protection of the law. This deprivation is documented by the fact that the City of Omaha is not and will not be prepared to provide essential services to the residents of SID 210, and that the resulting tax increase to the residents would not be met with an equitable return of city services. (App. 30).

Evidence was adduced at trial indicating that the residents of SID 210 would receive less essential services than they have received and come to rely on. (App. 7). For example, the Omaha Fire Department's rescue squad response times to SID 210, upon annexation, will be dangerously slow and well beyond those times recommended by national emergency medical care standards, as well as, the response time standards of the Omaha Fire Department itself. Additional evidence indicates that the Omaha Police Department also has dangerously slow response times and is not providing enough manpower to the sector of the City of Omaha adjacent to SID 210 at this time.

The Ordinance and purported annexation would further deprive the residents of SID 210 equal protection of the laws by diluting their voting strength in municipal elections, depriving them of their rights under the Voting Rights Act of 1965 and the Fourteenth Amendment of the United States Constitution. (App. 63-72). Some evidence at trial indicated that projected increased annexations over the next decade will dilute the voting strength of SID 210 residents as more people are piled into the voting district prepared for SID 210. Moreover, the City failed to comply with the preclearance procedures contained in the

federal Voting Rights Act which might prevent potential vote dilution problems occurring with annexation.

The challenged Ordinance was the result of a recommendation by the City of Omaha Planning Department Annexation Team. No evidence has been produced indicating that the City of Omaha or the Annexation Team attempted to preclear the annexation with the Attorney General of the United States or a three judge panel as is provided for in the federal Voting Rights Act of 1965 (42 U.S.C. § 1973c).

As stated above, evidence was also offered at trial indicating that annexation of the Piedmont and Wycliffe subdivisions would aggravate an already imbalanced population distribution among voting districts. The district court sustained an objection to this evidence on relevancy grounds. The Plaintiffs, however, made an offer of proof consisting of the Affidavit of Professor James Johnson, Ph.D., Political Science, Northwestern University, and certain exhibits showing the voting districts and their population bases. Professor Johnson indicated that the western districts of Omaha already were as much as 30% out of balance with other districts in Omaha, and that the annexation would increase the population of the relevant western districts by 10% thereby further diluting the voting rights of those citizens in certain western districts. Professor Johnson noted Omaha's past failure to remedy population imbalances and the according vote dilution caused by previous annexations. Professor Johnson concluded that the resulting disparities in the population bases of the various districts would dilute, water down and diminish the voting strength and rights of the citizens of the annexed subdivisions and relevant voting

districts in which they might be included upon annexation. (App. 69-72).

The District Court enjoined the annexation of SID 210 in 1987, pending the outcome of this litigation. The District Court and later the Nebraska Court of Appeals, however, declined to address the Petitioner's Constitutional challenges contained in its Second Amended Petition. (App. 5-6; 19). The Court of Appeals justified its refusal to address the constitutional challenges to the annexation on the grounds that the Appellants failed to adequately apprise the Attorney General's Office of their Constitutional challenges. (App. 6). The District Court and Court of Appeals also declined to address the Petitioner's claims under the Voting Rights Act of 1965. (App. 40-42). The Court of Appeals affirmed the district court's granting of summary judgment on the federal claim based on the grounds that SID 210 lacked standing to assert a claim, and that the claims of the individual plaintiffs were not ripe for adjudication until the annexation actually occurred. (App. 9-10; 27-28).

Petitioner requests the Supreme Court to declare that the lower court's refusal to address the Petitioner's constitutional challenges to the annexation to be in itself an unconstitutional denial of due process. Petitioner further requests the Court to find that SID 210 and the individual petitioners have standing to challenge the annexation under the Voting Rights Act and that such a challenge is ripe for adjudication. Finally, Petitioner's requests that the annexation be enjoined and declared invalid under

the Voting Rights Act of 1965, because the City has made no showing that it has obtained pre-clearance from the Attorney General or any other applicable authority with respect to the annexation of SID 210 and because the voting dilution caused by the annexation will result in an unconstitutional deprivation of voting rights to the residents of SID 210 under the "one man, one vote" principle embodied within the Constitution.

ARGUMENT IN SUPPORT OF GRANTING WRIT

This Court should grant the petition for writ of certiorari because the decisions of the Nebraska Court of Appeals and the District Court for Douglas County, Nebraska, are clearly contrary to the majority of decisions rendered by other courts throughout the country. The determination that Petitioner lacked standing to bring federal and constitutional voting rights challenges to the annexation on behalf of its residents is at odds with general precedent of this Court and specifically at odds with a determination by a federal circuit court of appeals. Similarly, the lower courts erred in concluding that the voting rights challenges were not ripe for judicial determination and adjudication. This decision violates both well established principles by this Court and other courts specifically addressing annexation and voting rights claims. Finally, the Nebraska Court of Appeals denied the Petitioner its due process rights to hearing and allowing an opportunity to be heard by not addressing its other constitutional arguments against the annexation, contrary to both decisions of other courts throughout the country and the United States Constitution.

I. PETITIONER SID 210 DOES NOT LACK STANDING TO CHALLENGE THE ANNEXATION STATUTE UNDER THE VOTING RIGHTS ACT AND U.S. CONSTITUTION.

SID 210 is a representative body which serves as the body politic for individuals who will be adversely affected by the proposed annexation. Courts have consistently held that representative groups may maintain actions on behalf of affected individuals. For example, in *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1480 (11th Cir. 1993), the Eleventh Circuit held that political organizations had standing and a sufficiently substantial legally protectible interest to intervene in a case involving alleged Voting Rights Act violations. Even though the organizations admittedly could not vote themselves, they did have sufficient standing because they acted as representatives of affected individuals with voting rights. *Id.*[1] Similarly in this case, the SID is acting as the representative of its residents whose rights will be affected upon annexation.

The United States Supreme Court has previously found that a "village" had standing to sue real estate brokers alleged to have engaged in steering prospective home buyers to different areas according to their race under the civil rights laws. *Gladstone, Realtors v. Village of*

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[1] The Nebraska Court of Appeals stated that SID 210 lacked standing to bring a Voting Rights Act claim because it did not have a right to vote and because it would be dissolved upon annexation. (Appendix 9). The Eleventh Circuit stated in *Meek* that "[t]he contention that these entities somehow conceded a lack of standing by admitting that they themselves cannot vote is specious." 985 F.2d at 1480.

Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979). The Court has also generally allowed associations to assert claims on behalf of their members. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988); and *Hunt v. Washington State Apple Adv. Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

In the present case, SID 210 is analogous to either the village or the associations. In all instances, the members of the representative body could have sued themselves but the suit through the larger body was likely more efficient because the interest it sought to protect was particularly germane to its organizational purpose and the individual members were not necessarily essential to gain the appropriate remedy or relief requested (such as the termination of certain conduct or the invalidation of a particular law).

These same principles are applicable in the present case. Certainly, individual plaintiffs could, and in fact did, bring suit to enforce their rights under the Voting Rights Act. However, a suit by and through the representative body, the SID, was more efficient for a number of reasons, not to mention the least of which was the cost of bringing and maintaining such a suit. In this case, the interests of the residents and the representative body coincide: both want to avoid annexation. For practical purposes it is more efficient to prosecute the action under the umbrella of the larger body, in part because all of the costs are shared by the members. Allowing such suits by a representative political body serves a very important

societal goal of ensuring access to the courts and reducing litigation by funneling potential multiple actions into a single suit.

Moreover, SID 210 has its own independent legally cognizable interest in this case to the extent that it will cease to exist if the annexation goes through. In *Harrison County v. City of Gulfport*, 557 So.2d 780 (Miss. 1990), the Mississippi Supreme Court found that a school district in an area sought to be annexed had standing to challenge the annexation under the Voting Rights Act. The court reasoned that the interest of the county was derived from the interest of the citizens of the county living in or owning areas tabbed for annexation. *Id.* at 783. It thus stated that it "is intuitively apparent that the county as a body politic will experience a legally cognizable effect from annexations. . . . and that the general requisites of standing to sue are easily satisfied." *Id.* These exact same principles apply in the present case because SID 210, the residents' body politic, is asserting an interest and a claim derived from and on behalf of its affected citizens and residents.

Finally, implicit in the U.S. Supreme Court's decision in *N.A.A.C.P. v. Hampton County Election Comm'n*, is the assumption that such representative bodies may challenge changes in election procedure without preclearance from the appropriate authority. 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985).

Thus, Petitioner requests this Court grant its Petition for Certiorari Review because the Nebraska Court of Appeals erred in concluding that SID 210 did not have

standing to challenge the annexation under the United States Constitution and the Voting Rights Act.

II. THE INDIVIDUAL RESIDENTS' CHALLENGE OF THE ANNEXATION UNDER THE VOTING RIGHTS ACT AND U.S. CONSTITUTION WAS RIPE FOR JUDICIAL DETERMINATION AND ADJUDICATION.

The Nebraska Court of Appeals declined to address the individual residents' challenge to the annexation based on non-compliance with the Voting Rights Act and the infringement on their constitutional rights resulting from the vote dilution which will occur with annexation. The Court of Appeals concluded that the residents' claim would not be ripe for adjudication until after the annexation occurred.

The Court of Appeals is clearly off the mark. The residents' voting rights will be immediately affected with annexation because the process of selecting candidates, the campaign process, and their immediate representation in city government will change. Even assuming arguendo the residents' constitutional claim of vote dilution is not ripe until the annexation occurs, and correspondingly their votes are actually diluted, this still does not mean that the claim based on non-compliance with the Voting Rights Act is not ripe.

The Section 5 Voting Rights Act claim is clearly ripe for adjudication because the violation of the act has already occurred. 42 U.S.C. § 1973c. The City has not gained or even attempted to gain preclearance from the

Attorney General or other proper authority before taking action which would affect voting procedures.

Surely one of the very reasons why Congress required preclearance was to prevent vote dilution or discriminatory voting impacts from occurring in the first place. *See Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, 1481 (S.D.Ga. 1989) ("the very purpose of section 5 is to require preclearance before changes can be put into effect, and to avoid using litigation by voters as the mechanism for testing changes in voting laws."). If Congress intended that the voters' rights must be first infringed upon to create standing under the Act, there would be no reason for requiring preclearance. Logically, it is better to prevent possible invalid elections from occurring in the first place. Under the Nebraska Court of Appeals logic, however, there would always be the possibility of invalid elections because citizens would not be able to challenge the governmental action until after the campaign and election process. The better policy is to find the matter ripe for adjudication when the violation occurs, in other words when the State or political subdivision fails to obtain or even attempt to obtain preclearance when required to do so by federal law.

In the present case, the City of Omaha has failed to gain preclearance from the proper authority before attempting to implement the annexation ordinance. Annexation obviously will affect voting procedures in both Omaha and the area which at that time would be the former SID 210. Thus, by the clear language of the statute, the City has failed to comply with the law. The

matter is already ripe for judicial determination and adjudication, regardless of whether the annexation will actually result in vote dilution. Furthermore, there is no need, and indeed no logical reason, for requiring the annexation to go through first before allowing the individual residents to challenge the act based on Omaha's noncompliance with the law. Placing such a restriction on potentially adversely affected parties would render Congress' preclearance requirement superfluous. Thus, the matter should be found ripe for adjudication and the annexation should be stayed and/or invalidated until the City complies with the law.

III. THE ANNEXATION OF SID 210 BY THE CITY OF OMAHA VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AS WELL AS THE FEDERAL VOTING RIGHTS ACT.

Whenever a local government decides to select its officials by popular election to perform governmental functions, and selects their officials from separate districts, equal protection requires that each district be established on a one man-one vote basis. *See, e.g., Hadley v. Junior College Dist.*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); and *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

In the present case, there was unrefutted evidence indicating that the annexation will result in population imbalances in voting districts within the City of Omaha. As it appears at the present time, upon annexation the

affected residents will merely be lumped into a pre-existing district. This will result in an imbalance in the population bases among the various districts. This imbalance will effectively mean that certain voters, including those in SID 210 and those in whatever district they are added to, will have their voting power diluted vis-a-vis citizens of the other districts.

Notwithstanding the equal protection claim, the annexation is also in clear violation of the Voting Rights Act of 1965 (42 U.S.C. §§ 1973 et seq.). A number of courts, including the United States Supreme Court, have held that 42 U.S.C. § 1973 is applicable to annexations. *See, e.g., Perkins v. Matthews,* 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971); *Harrison County v. City of Gulfport,* 557 So.2d 780 (Miss. 1990); *City of Port Arthur v. United States,* 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982); *City of Pleasant Grove v. United States,* 568 F.Supp. 1455 (D.D.C. 1983); and *Sperry Rand Corp. v. City of Jackson,* 248 So.2d 810 (Miss. 1971).

42 U.S.C. § 1973 et seq. was enacted by Congress to protect voters from racially discriminatory voter redistricting and other restrictions diluting the strength of a person's vote. For instance, 42 U.S.C. 1973a(a) provides:

> *Whenever* the Attorney General or *an aggrieved person institutes a proceeding under any statute to enforce voting guarantees of the fourteenth or fifteenth Amendment in any state or political subdivision* the court shall authorize the appointment of federal examiners by the Director of the Office of Personnel Management in accordance with Section 1973d of this title to serve for such

> period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth Amendment. . . . (emphasis added).

Implicit in the language of this statute is the notion that private citizens (or their representatives) may bring an action under the Voting Rights Act when their right to vote has been infringed by means such as dilution of voting power.

Courts have also held that a cause of action under 42 U.S.C. 1973 does not necessarily require plaintiffs prove intentional or purposeful discrimination; they need only prove a discriminatory result. *Chapman v. Nicholson*, 579 F.Supp. 1504, 1507 (1984). Nor should aggrieved persons be restricted from bringing an action under 42 U.S.C. § 1973 without allegations of racial discrimination. It seems logical that Congress would not afford more rights to some individuals to protect the "one man, one vote" principle, than to others. Thus, the residents of SID 210 possess a ripe challenge to the annexation under 42 U.S.C. § 1973a of the Voting Rights Act.

Additionally, it is well established that states and political subdivisions cannot implement any election practices different from those in force on November 1, 1964, without first obtaining clearance. *N.A.A.C.P. v. Hampton County Election Comm'n*, 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985). The city's annexation of land constitutes a "change in voting practice or procedure" subject to preclearance under Voting Rights Act. *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 107 S.Ct. 794, 93

L.Ed.2d 866 (1987). Accordingly, annexation must be precleared before those residing in the area may vote. *Id.*

Under a § 1973c challenge it is not the province of a court to determine whether changes in election procedure resulted in impairment of the right to vote, or whether they were intended to have that effect; the court's inquiry is limited to determining whether the challenged alteration had the potential for discrimination so as to require preclearance under the Voting Rights Act. *N.A.A.C.P. v. Hampton County Election Comm'n*, 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985). Moreover, at least one court has indicated that annexing areas with a majority of white inhabitants may violate the act because of its potential discriminatory impact. *City of Pleasant Grove v. U.S.*, 568 F.Supp. 1455, 1458-60 (D.D.C. 1983).

As stated earlier, there is no evidence that the City of Omaha obtained preclearance prior to enacting the annexation Ordinance. The failure to comply with Section 5 of the Voting Rights Act constitutes an independent justification for invalidating the annexation. *See, e.g., In Re City of Booneville*, 551 So.2d 890, 895 (Miss. 1989) (indicating annexation ordinances should not be enforced until the city has complied with Section 5).

Thus, 42 U.S.C. §§ 1973 et seq. provide the Petitioner and its residents with a cause of action to protect their voting rights. The failure of the lower courts to find standing for the SID to raise the issue and the determination that the individual residents' claims were not ripe for adjudication were clearly erroneous. The City has already violated that statute by failing to pre-clear the annexation. Furthermore, the residents' voting rights as defined

by 42 U.S.C. 1973 et seq. will be immediately affected upon annexation. The annexation, therefore, clearly violates federal law and should be invalidated.

IV. THE NEBRASKA COURT OF APPEALS DENIED PETITIONER DUE PROCESS OF LAW BY REFUSING TO CONSIDER CONSTITUTIONAL CHALLENGES TO NEBRASKA REVISED STATUTE § 14-117 AND OMAHA CITY ORDINANCE NO. 31294.

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment United States Constitution.

In the present case, the City of Omaha has attempted to annex a residential subdivision encompassed in Sanitary and Improvement District No. 210. Evidence was adduced at trial demonstrating that the annexing authority, the City of Omaha, will not be able to provide certain essential services in a timely, safe, or efficient manner once the annexation is completed. The City's actions thereby not only deprive the residents of life, liberty and property without the due process and equal protection of the laws guaranteed to them by the Fourteenth Amendment, but also amount to an unconstitutional taking without just compensation in violation of the Fifth Amendment of the United States Constitution.

The Nebraska Court of Appeals, however, refused to address Petitioner's challenge to the annexation on Constitutional grounds because the Petitioner allegedly failed to comply with Nebraska Revised Statute § 25-21,159.[2] Section 25-21,159, dealing with declaratory proceedings in which a statute ordinance or franchise is alleged to be unconstitutional, provides that the Attorney General of the state (of Nebraska) shall be served with a copy of the proceeding and be entitled to be heard.

Petitioner's Petition, Amended Petition and Second Amended Petition all reflect that the Plaintiffs in the underlying case sent notice of the Petitions to Robert Spire, the Attorney General for the State of Nebraska at that time. *See* Paragraph 5 of Petition, Amended Petition and Second Amended Petition. Defendant's Answer admitted such service. The fact that the Attorney General failed to intervene should not invalidate the Petitioner's constitutional claims. The Attorney General was sent notice of the action and obviously had an opportunity to intervene, that is all that the statute requires by its plain language.

The Nebraska Court of Appeals, however, stated that the Attorney General was not properly served until April 12, 1993 (the date when the Attorney General was served with "Notice of Constitutional Questions"). As stated above, this is clearly an erroneous statement. The

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[2] The District Court also declined to address Petitioner's constitutional challenges reasoning that the only constitutional challenges which could be reviewed would be those of procedural due process. Order of District Court of Douglas County, Nebraska dated September 29, 1992. (Appendix 19).

Nebraska Attorney General, at the time, was served with a copy of the Second Amended Petition. Neb. Rev. Stat. § 25-21,159 only requires service of a "copy of the proceeding" and an opportunity to be heard. This requirement, in so far as it could be met, was complied with by the Petitioner and other Plaintiffs in the original action.

Moreover, the Attorney General did not at any time attempt to intervene or request an opportunity to be heard. *Cf. Metropolitan Utilities District v. City of Omaha*, 107 N.W.2d 397, 400 (Neb. 1961) (copies of a declaratory judgment raising a constitutional question were sent to the Attorney General, but no appearance was entered on his behalf). It is grossly unjust to allow a court to dodge constitutional questions under the guise of a party having failed to comply with a technical notice statute, that likely would not have engendered a response from the Attorney General in any event.

Even if the statute could serve as a basis for declining to address constitutional challenges, it surely cannot when the party required to be sent notice did in fact receive notice. Obviously, the Court of Appeals erred when it declined to review the Petitioner's constitutional challenges to the annexation on the grounds that the Plaintiffs in the underlying action failed to comply with a Nebraska law requiring notice to the Attorney General of the state. The failure to review the Petitioner's constitutional challenges, thereby, violated its rights to due process and equal protection of the laws.[3]

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[3] The Constitutional guarantee of due process requires notice and opportunity to be heard. *Powell v. Alabama*, 287 U.S.

Furthermore, application of § 25-21,159 to any Plaintiff generally violates the due process of law afforded by the United States Constitution. Statutes may be so vague as to violate due process. *See, e.g., Grayned v. Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); and *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). In this case, the statute which the Nebraska Court of Appeals relied upon to justify a refusal to examine the Petitioner's Constitutional objections to the annexation is so vague as to render enforcement a violation of Petitioner's right to Due Process.

Nowhere in the statute is there set out any time requirements for service to be made on the Attorney General. The statute also does not state what a "copy of the proceeding" is. In this case, the Petitioner sent a copy of the Petition. The law does not specifically state what is required. The unilateral decision of the Nebraska Court of Appeals to apparently require a "Notice of Constitutional Questions" violates the Petitioner's right to due process, because the law does not state with any exactness what is required. As a result, any Plaintiff would be at risk of being found to have not complied with the statute, even though the statute does not exactly spell out what type of service would comply.

Moreover, the statute does not indicate what the remedy or penalty is for failure to comply with the statute. Some Nebraska caselaw seems to indicate that the

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45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Implicit in this requirement, is the expectation that a party's constitutional objections will be examined by a court of competent jurisdiction.

action should be dismissed without prejudice. *See, e.g., Marsh v. Marsh,* 113 N.W.2d 323 (Neb. 1962) (dismissal without prejudice proper where essential parties are not present). In the present case, however, the trial was allowed to proceed, with no notice whatsoever to Petitioner that its constitutional challenges would not be addressed later due to an alleged failure to comply with technical notice rules. The Petitioner was only notified of the defect and corresponding refusal to address the questions after the case was submitted to the appellate court. The Petitioner could not in any way have been on notice that the court would refuse to address its constitutional questions under the language of the statute. At worst, the Petitioner could expect, and due process would seem to require, a simple dismissal without prejudice or a remand with directions in order to allow the Petitioner to fully and adequately comply with § 25-21,159.

Statutes must afford parties some notice of the effect of a failure to comply with them, not to mention some specific indication of how to comply with them. Nebraska Rev. Stat. § 25-21,159 fails to afford either of these requisites to due process.

In the present case, all courts have either erred in their decision making (such as the District Court's conclusion that the Petitioner lacked standing) or refused to properly address the Petitioner's objections to the annexation on the grounds that it violates the Constitution. Due Process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated. *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). In this case, it is patently unfair to allow the annexation to proceed

without examining the potential constitutional defects of such action. The Petitioner attempted to comply with the vague statute as best it could. The decision of the Court of Appeals to define the Nebraska notice requirement in such a way that the Petitioner could not comply with it only when the case was already on appeal, violated the Petitioner's right to due process. Not only have the residents of SID 210 had their rights violated by the annexation itself, but also by the Nebraska Court of Appeals in declining to address their constitutional objections based upon their application of a vague statute.

CONCLUSION

The City of Omaha has failed to preclear its annexation as required by federal law. This annexation will immediately adversely affect and dilute the voting rights of the residents of SID 210. SID 210 has the requisite interest in the action to enable it to assert standing on behalf of its residents, whose constitutional and federal law claims are ripe for adjudication. The Court of Appeals determination that the SID lacked standing and that the claims of the residents were not ripe are clearly contrary to the majority of the decisions on these subjects as derived from the United States Supreme Court, lower federal courts, and the supreme courts of other states. Moreover, the Court of Appeals denied the Petitioner its due process of law in its application of Neb. Rev. Stat. § 25-21,159 to justify declining to address Petitioner's constitutional challenges to the annexation. Petitioner,

therefore, respectfully requests this Court to grant its Petition For Certiorari Review for the above stated reasons.

Respectfully submitted,

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OPINION OF THE NEBRASKA COURT OF APPEALS

(Not Designated for Permanent Publication)

Case Title

Sanitary and Improvement District No. 210 of Douglas County, Nebraska, a corporation, and Ruth Forbes and Paula Weekley, individuals, Appellants,

v.

The City of Omaha, Nebraska, a municipal corporation, et al., Appellees, and Sanitary and Improvement District No. 230 of Douglas County, Nebraska, a public corporation, and Robert L. VanVranken, an individual, Intervenors-Appellees.

Case Caption

S.I.D. No. 210 v. City of Omaha

Filed December 20, 1994. No. A-92-965.

Appeal from the District Court for Douglas County: Robert V. Burkhard, Judge. Affirmed.

James D. Sherrets, Karl D. Vogt, and Mary M. Carnazzo, of Sherrets Smith & Gardner, P.C., for appellants.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger for appellees.

1. Annexation: Ordinances: Equity. An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.

2. Equity: Appeal and Error. On an appeal from a district court to an appellate court, an equity case is tried de novo on the record, requiring the appellate court to reach

a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

3. Constitutional Law: Courts: Appeal and Error. The Nebraska Court of Appeals may, when necessary to decide a case before it, determine whether a constitutional question has been properly raised.

4. Constitutional Law: Statutes: Ordinances: Franchises: Service of Process. If a statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

5. Municipal Corporations: Annexation. A municipality cannot annex property for revenue purposes only.

6. Courts: Declaratory Judgments: Justiciable Issues. A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination.

7. Annexation: Words and Phrases. "Rural" means of or pertaining to the country as distinguished from a city or town, whereas "urban" means of or belonging to a city or town.

8. Motions for Continuance: Appeal and Error. An appellate court reviews a denial of a motion for continuance for an abuse of discretion.

Connolly, Irwin, and Miller-Lerman, Judges.

IRWIN, Judge.

I. INTRODUCTION

This case involves an action brought by plaintiffs, Sanitary and Improvement District No. 210 of Douglas County, Nebraska (S.I.D. No. 210), and two of its residents, to enjoin an ordinance enacted by the City of Omaha to annex S.I.D. No. 210. Plaintiffs challenged the annexation statute and the ordinance on several grounds. After a trial, the district court for Douglas County dismissed plaintiffs' request for injunction and dismissed their second amended petition. For the reasons set forth below, we affirm.

II. FACTUAL BACKGROUND

In July 1987, the Omaha City Council passed ordinance No. 31294, which authorized the annexation of S.I.D. No. 210 and Sanitary and Improvement District No. 230 of Douglas County, Nebraska (S.I.D. No. 230). S.I.D. No. 210 encompassed a residential housing subdivision known as Wycliffe, and S.I.D. No. 230 encompassed a residential housing subdivision known as Piedmont. Wycliffe and Piedmont are near the western edge of the Omaha city limits, between Pacific Street and West Dodge Road and between 144th and 156th Streets. The ordinance also authorized the annexation of a 60-foot wide, approximately 1/4-mile long strip of land along and including Pacific Street, stretching from the existing city limits to the Piedmont subdivision.

Plaintiffs filed an action against the city in the district court for Douglas County, asserting that the annexation statute, Neb. Rev. Stat. § 14-117 (Reissue 1991), and ordinance No. 31294 were unconstitutional. The petition also

alleged that the annexation ordinance was invalid on several other grounds. S.I.D. No. 230 did not oppose the annexation and became intervenors in the action, supporting the city's position. Plaintiffs sought a declaratory judgment, a temporary restraining order, and an order permanently enjoining the city from annexing S.I.D. No. 210. After a trial, the district court denied plaintiffs' request for injunction and dismissed plaintiffs' second amended petition. Plaintiffs thereafter timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Plaintiffs claim that the district court erred in (1) finding that the annexation statute did not violate due process and equal protection clauses and did not constitute special and class legislation and that the ordinance was not arbitrary, capricious, and unreasonable; (2) finding that the city could provide adequate police, fire, and rescue squad service to S.I.D. No. 210; (3) finding that the city was not annexing for revenue purposes only; (4) finding that the city did not annex land that was rural in character; (5) finding that the Pacific Street corridor annexed by the city created a substantial link to the city; (6) finding that plaintiffs had no standing to challenge the city council district-based voting imbalance that the annexation would create; and (7) finding that a police study conducted by the city was not relevant.

IV. STANDARD OF REVIEW

[1,2] "An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds

in equity." *Swedlund v. City of Hastings*, 243 Neb. 607, 610, 501 N.W.2d 302, 305 (1993). See, *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968); *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). On an appeal from a district court to an appellate court, an equity case is tried de novo on the record, requiring the appellate court to reach a conclusion independent of the findings of the trial court. However, when credible evidence conflicts, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Swedlund, supra; Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992).

V. ANALYSIS

1. Constitutionality of Statute and Ordinance

(a) Statute

[3] Plaintiffs claim that the annexation statute applicable to the City of Omaha, § 14-117, is unconstitutional, alleging several bases for their claim. While we recognize that the Nebraska Court of Appeals does not have jurisdiction to determine the constitutionality of a statute, Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1994), this court may, when necessary to decide a case before it, determine whether a constitutional question has been properly raised, *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). In the present case, plaintiffs have not properly challenged the constitutionality of this statute.

[4] Neb. Rev. Stat. § 25-21,159 (Reissue 1989) provides that "if statute, ordinance or franchise is alleged to

be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard." In *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994), the Supreme Court denied the plaintiffs' declaratory relief on the issue of the constitutionality of a statute because the plaintiffs had failed to notify the Attorney General of the action until after the case had been tried and 6 months after the case had been on appeal.

In the present case, the record shows that the Attorney General was not given notice of this action until April 12, 1993, after the case had been tried and while the case was on appeal to this court. Because plaintiffs failed to comply with the terms of § 25-21,159, the constitutionality of § 14-117 was never properly before the trial court, and plaintiffs were not entitled to declaratory relief on this issue. Plaintiffs' first assigned error is therefore without merit.

(b) Ordinance

In their second amended petition, plaintiffs also alleged that the ordinance annexing S.I.D. No. 210 was unconstitutional because the city was unable to provide police, fire, and rescue squad service to S.I.D. No. 210; the ordinance was enacted for revenue purposes only; and the ordinance would create a voting imbalance with regard to city council elections. As with their constitutional challenge of § 14-117, plaintiffs failed to notify the Attorney General of these constitutional challenges to the annexation ordinance until after trial. Plaintiffs are likewise prevented from obtaining declaratory relief on these

issues. We therefore find that plaintiffs' second, third, and fifth assigned errors are without merit insofar as these assigned errors raise constitutional challenges to the annexation ordinance. However, we will address these assigned errors on the merits insofar as they raise nonconstitutional issues and were pled as such at trial.

2. City's Ability to Provide Services

At trial there was conflicting testimony regarding whether the city would be able to provide adequate police, fire, and rescue squad service to Piedmont and Wycliffe. Plaintiffs presented expert testimony tending to show that the city was currently understaffed with regard to fire, police, and rescue personnel and that the city could not provide adequate services to Wycliffe and Piedmont upon annexation. The city presented expert testimony establishing that the city currently had adequate service personnel and that the city could adequately service the areas it sought to annex. The trial court found that the city could provide adequate services. Giving weight to the fact that the trial court observed the witnesses and accepted the city's evidence and having independently reviewed the record, we find that the city can provide adequate services to Piedmont and Wycliffe.

3. Annexation Solely for Revenue Purposes

[5] Plaintiffs also claim that the city desired to annex the Wycliffe subdivision solely for the purpose of raising revenue. Plaintiffs correctly assert that a municipality cannot annex property for revenue purposes only.

S.I.D. No. 95 v. City of Omaha, 221 Neb. 272, 376 N.W.2d 767 (1985). However, plaintiffs failed to present evidence showing that the city sought to annex Wycliffe solely for revenue purposes. Plaintiffs merely put forth evidence that S.I.D. No. 210 had a lower debt ratio than other S.I.D.'s in the vicinity that were not slated for annexation. A similar argument was made in *S.I.D. No. 95, supra*, wherein the court responded:

> By annexing the S.I.D., the City of Omaha assumed the obligation for all of the S.I.D.'s liabilities. . . . Therefore, to suggest that the city will acquire all of the funds of the S.I.D. without recognizing that it will also incur substantial obligations is to ignore the reality of the matter. Certainly, a city has a right to defer annexing an adjacent area until it determines that it can reasonably assume the obligations which will be imposed upon the city by reason of the annexation.

Id. at 278, 376 N.W.2d at 771-72.

In this case, even plaintiffs' evidence established that the city will incur substantial costs in providing the S.I.D. with adequate police, fire, rescue, and parks and street maintenance services. In addition, the city's finance director testified that the city would not profit financially from the annexation of S.I.D. No. 210. He tesitified that, to the contrary, the cost of annexing S.I.D. No. 210 would be greater than the net income the city would receive from such annexation over a 10-year period. We find that the district court correctly concluded that the city was not annexing S.I.D. No. 210 solely for revenue purposes.

4. Voting Imbalance

In their second amended petition, plaintiffs claimed that the annexation ordinance would result in denying the residents of S.I.D. No. 210 equal voting rights when compared with rights of residents of other voting districts in Omaha. The district court granted the city summary judgment on this issue, holding that plaintiffs did not have standing with regard to this issue at the time. Plaintiffs claim that the district court erred in granting partial summary judgment on this issue.

[6] With regard to S.I.D. No. 210, the district court correctly held that it lacked standing, for not only does a corporation have no right to vote, but, upon annexation, it will be dissolved. However, with regard to the individual plaintiffs who are residents of the district, we believe that the issue is more properly one of ripeness. In *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 253-54, 518 N.W.2d 124, 126-27 (1994), the court stated:

> A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination. [Citation omitted.] Therefore, an action for a declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. [Citations omitted.]
>
> While it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. [Citations omitted.] Mere apprehension or the mere threat of an action or a suit

> is not enough. [Citations omitted.] Nor is a declaratory judgment action to be used to adjudicate hypothetical or speculative situations which may never come to pass. [Citation omitted.] The declaratory judgment proceedings do not " 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " [Citation omitted.]

In the present case, the individual plaintiffs seek to enjoin the enforcement of the annexation ordinance before S.I.D. No. 210 is even assigned to a city council voting district. We will not know how the individual plaintiffs' voting rights stack up vis-a-vis those of other Omaha residents until annexation occurs. We conclude that this issue does not present the required element of a controversy, and we therefore reject this assigned error.

5. Rural Versus Urban

In their fourth assigned error, plaintiffs contend that the trial court erroneously found that the land annexed was not rural in character and that, as such, the city violated § 14-117. Section 14-117 authorizes cities of the metropolitan class to extend their corporate limits via annexation, with the following proviso: "This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character."

There is no question that the Piedmont and Wycliffe subdivisions themselves are not rural in character, as they are fully developed residential areas. Plaintiffs, claim is that the 1/4-mile stretch of Pacific Street between these

subdivisions and the former city boundary is rural in character.

In *Piester v. City of North Platte*, 198 Neb. 220, 223, 252 N.W.2d 159, 161 (1977), the court stated that "the character of a segment of an Interstate Highway sought to be annexed is to be determined from the areas immediately adjacent to the annexed portion." Likewise, the character of the segment of Pacific Street sought to be annexed in the present case is to be determined from the areas immediately adjacent to the annexed segment of Pacific Street.

[7] The annexed portion of Pacific Street that connects the subdivisions to the city was bordered on the north side by agricultural land owned by Boys Town, an incorporated municipality. Land on the north side of Pacific Street at this point was also used for agricultural purposes. However, as the above-quoted language from § 14-117 indicates, the use of land for agricultural purposes does not necessarily mean the land is rural in character. Rather, location of the land as well as its use determine whether it is rural or urban in character. *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993); *Omaha Country Club v. City of Omaha*, 214 Neb. 3, 332 N.W.2d 206 (1983).

> " 'Rural' means of or pertaining to the country as distinguished from a city or town, whereas 'urban' means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes but which tracts are, in fact, urban in character. It was clearly not the intention of the

> Legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it."

Id. at 4, 332 N.W.2d at 207 (quoting *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952)).

Although the land adjacent to the Pacific Street corridor is agricultural, it is surrounded by residential areas. In fact, the agricultural land in question appears as an island in the middle of an urban or suburban area. Under these circumstances, we cannot find that the Pacific Street corridor is rural in character, and, accordingly, we reject this assigned error.

6. Substantial Link

Plaintiffs allege that the district court erred in finding that the 1/4-mile stretch of Pacific Street between the subdivisions and the existing city limits is a "substantial link" to the city. We disagree. In *Bierschenk v. City of Omaha*, 178 Neb. 715, 722, 135 N.W.2d 12, 16 (1965), the court stated:

> [A] city of the metropolitan class may annex an area by extending its boundaries to form a common one with the portion annexed if the area so attached is urban in nature and is connected to the city by a *substantial link* of narrower land of the same character.

(Emphasis supplied.) Testimony from plaintiffs' own witnesses established that Pacific Street is a major urban thoroughfare and not a "farm road." In fact, plaintiffs assert that the corridor is so congested that an emergency vehicle could have a difficult time negotiating its way

through the city traffic on the annexed portion of Pacific Street. We find that this assigned error is also without merit.

7. Police Study

At the beginning of the trial in December 1991 and again on February 26, 1992, plaintiffs motioned the court for a continuance, claiming that a study on the city's ability to provide police services was to be completed in March 1992. The court denied such motions. On June 4, while a decision was pending in this case, plaintiffs' motion to supplement the record was filed in order to present to the court the above-referenced study, which was to be ready by June 11. Plaintiffs filed a similar motion on June 16. The trial court docket sheet indicates that the court denied both of these motions as well. In their final assigned error, plaintiffs claim that the trial court "erred in finding that the police study . . . was not relevant."

[8] There is nothing in the record before this court indicating that the trial court found that this police study was not relevant. The record merely establishes that the trial court denied plaintiffs' motions for a continuance and motions to supplement the record. This court reviews a denial of a motion for continuance for an abuse of discretion. See, *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988). Further, plaintiffs' motions to supplement the record were substantively identical to a motion to withdraw rest and offer additional evidence, which is

also reviewed for an abuse of discretion. See *Bennett v. Bennett*, 189 Neb. 654, 204 N.W.2d 379 (1973).

A court has abused its discretion if its decision is based upon reasons that are untenable or unreasonable, or if its action is clearly against justice, conscience, reason, or evidence. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). This action was filed in August 1987. The trial court's docket sheet shows that the pretrial proceedings were delayed "by agreement of counsel" on at least 10 occasions from September 1988 through August 1990. In ruling on plaintiffs' second motion for continuance, the trial judge stated that he did not wish to delay a decision in this case any longer. Under such circumstances, we find that the trial court did not abuse its discretion in either denying plaintiffs' continuance or denying plaintiffs' motion to supplement the record.

VI. CONCLUSION

Having reviewed the district court's decision de novo on the record, we affirm.

AFFIRMED.

IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation; and RUTH FORBES and PAULA WEEKLEY, Individuals,	)	DOC. 862 NO. 462
Plaintiffs,	)	
vs.	)	ORDER
THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR P. J. MORGAN, successor to MAYOR BERNIE SIMON; STEVE EXON; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; LEE TERRY; RICHARD TAKECHI; and SUBBY ANZALDO, all as Council Members of the City of Omaha,	)	
Defendants,	)	
SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, a Public Corporation; and ROBERT L. VANVRANKEN, an Individual,	)	
Intervenors.	)	

This matter came on for trial to the Court on December 2, 3, 4, and 5, 1991, and February 26, 1992. The plaintiffs, on December 4, 1991, asked leave to file a third amended petition, and that request is denied. Orders were signed on March 25, 1992, and on April 16, 1992, regarding exhibits and other matters. On June 4, 1992, the

plaintiffs' motion to supplement the record was overruled, and arguments were made by counsel. On June 25, 1992, the plaintiffs' motion to supplement the record was again overruled. The Court, after taking the matter under advisement, finds as follows:

1. In 1987 the City Council of Omaha passed Ordinance No. 31294 which provided for the annexation of SID 210 and SID 230 under Section 14-117, R.R.S. 1943.

   The statute governing the annexation of territory by a city of the metropolitan class under Section 14-117 reads in part as follows:

   > "The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction ***; Provided, that any other laws and limitations defining the boundaries of cities or villages or the increase of area or extension of limits thereof, shall not apply to lots, lands, cities or villages annexed, consolidated or merged under this section. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character."

2. The plaintiffs allege that 14-117 is unconstitutional and is void with respect to the

plaintiffs for various and sundry reasons. The plaintiffs further allege that the ordinance is arbitrary, capricious, and unreasonable.

In the case of *Wagner v. City of Omaha*, 156 Neb. 163, the Court stated as follows:

> "Annexation of territory under this authority [14-117] is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the lands to be annexed . . . "
>
> "Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed. . . .
>
> "In doing so it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act. . . .
>
> "A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it. . . .
>
> "The burden is on one who attacks an ordinance, valid on its face and enacted

under lawful authority, to prove facts to establish its invalidity."

In *Bierschenk v. City of Omaha*, 178 Neb. 715, the Court states:

> "It is only necessary to determine that under section 14-117, R.R.S. 1943, a city of the metropolitan class may annex an area by extending its boundaries to form a common one with the portion annexed if the area so attached is urban in nature and is connected to the city by a substantial link of narrower land of the same character."

In *Airport Authority of City of Millard v. City of Omaha*, 185 Neb. 623, the Court states:

> "Section 14-117, R.R.S., 1943, provides that the city council may at any time extend the corporate limits of a metropolitan city. There is no restriction on this right when properly exercised."

3. Contesting an annexation because current services may not be provided after annexation, as plaintiffs allege, requires inquiry into the wisdom of annexing a particular area. In *City of Decorah v. Peterson*, 203 N.W.2d 629, annexation was upheld despite challenge to the city's capabilities. The plaintiffs argued that annexation would result in increased taxes, loss of school busing service, and other disadvantages to residents of the annexed territory. The Court stated that these are matters not to be considered in ruling on the city's right to annex. The Court relied upon testimony that the city had a police and fire department, street

maintenance, a water department, and other established systems to provide the basic city services.

The capability to provide services is not a statutorily-imposed limitation on a municipal city's delegated annexation powers. The only constitutional limitations on annexation recognized by the Nebraska courts are those of procedural due process.

S.I.D. No. 95 v. City of Omaha, 221 Neb. 272, arose through the challenge of an annexation ordinance by SID No. 95 on behalf of the residents of Mockingbird Hills West Subdivision located in Douglas County. Among several issues the plaintiffs challenged the ability of the City to provide municipal services to the annexed area, arguing that the city had not studied the feasibility of providing services to the annexed area. SID 210 also challenges the ability of the City of Omaha to provide adequate services.

Although clearly not fully applicable to the case at hand, the Court in *S.I.D. No. 95* disposed of that argument by stating as follows:

> "What has been said with regard to the revenue may likewise be said with regard to the claim that the city has not studied the feasibility of providing services to the annexed area. There is no evidence to support a claim that the city is not prepared to provide necessary services. No evidence has been introduced to support a claim that the City of Omaha will not maintain and repair the

> streets and sewers, or shovel the snow upon the streets, or provide police or fire protection. In the event that the city should fail to provide adequate services for the area, the citizens may have some claim. But the mere fact that a feasibility study was not conducted to determine whether the city would perform the duties which it is by law obligated to perform does not render the annexation invalid . . . "

4. A party challenging an annexation ordinance has the burden of proving facts to establish its invalidity, where it is valid on its face and enacted under lawful authority. *S.I.D. No. 95 v. City of Omaha, supra.*

> "In the absence of a showing that the city council acted outside of their granted powers, or of a showing that they abused the discretion lodged with them, in the exercise of a granted power, the finding of the city council is conclusive.
>
> "The burden of doing so was on appellees. As stated in 6 McQuillin, Municipal Corporations (3d ed.), § 20.08, p. 18: 'The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. The burden of establishing a want of a rational basis for an ordinance and that it is unreasonable and arbitrary is on the one asserting the same. Likewise, the burden of proof to sustain a right to equitable relief against the enforcement of an

ordinance on the ground that it is invalid rests upon the complainant; the reason is that the presumption is in favor of the validity of the ordinance.' " *Wagner v. City of Omaha*, supra.

5. The plaintiffs, as noted above, allege that if the City of Omaha is allowed to annex SID 210, the City would be incapable of providing certain essential services. Specifically, the plaintiffs allege the City would be incapable of providing adequate police, fire and rescue squad service to SID 210.

Although there was some conflict in the testimony, the Court finds that the City of Omaha could provide adequate police, fire and rescue squad service to SID 210. The fact that the *initial* service *may* not be quite up to the standards that SID 210 is currently enjoying is not a valid objection to annexation.

Plaintiffs also allege that the City of Omaha was not capable of providing adequate street and park maintenance to the SID 210 area. The City of Omaha could provide adequate street and park maintenance to SID 210.

6. The annexation herein was not "simply" for the purpose of revenue enhancement, although that is an important factor. As stated in *S.I.D. No. 95 v. City of Omaha*, supra:

"That brings us, then to S.I.D. 95's next claim, that the annexation was undertaken simply because the city desired to obtain revenue. While it is true that a

> municipality cannot annex property for revenue purposes only, . . . it is likewise true that the evidence in this case does not support that claim. By annexing the S.I.D., the City of Omaha assumed the obligation for all of the S.I.D.'s liabilities. . . . Therefore, to suggest that the city will acquire all of the funds of the S.I.D. without recognizing that it will also incur substantial obligations is to ignore the reality of the matter. Certainly, a city has a right to defer annexing an adjacent area until it determines that it can reasonably assume the obligations which will be imposed upon the city by reason of the annexation. The facts in the instant case do not support a claim that the city's only objective in annexing the land in question was to become the recipient of increased revenues, free of corresponding obligations. The city was acquiring a fully developed area, and therefore, in addition to paying off any and all bond obligations of the area, it further assumed the responsibility of providing all necessary improvements and services."

William Miskell, the City Finance Director, testified that he is familiar with the financial status of the SIDs in question, and that the City of Omaha is financially capable of providing services to these areas. Miskell testified that the annexation of SID 210 would result in the City receiving $160,000 net; however, over a 10-year period, the City would have to spend an additional $190,000 to annex SID 210. Thus, the annexation

would impact the City to a minor negative degree. This is, therefore, not a situation where annexing is for revenue purposes only, but clearly quite the opposite.

7. A Nebraska city of the metropolitan class may annex a segment of street right-of-way to provide a connection between the municipality and an area it seeks to annex, so long as the character of that segment is urban or suburban.

Annexation of streets and highways is specifically authorized. "The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, *street or highway,* such distance as may be deemed proper in any direction. . . . " 14-117, R.R.S. 1943. (Emphasis supplied.)

Further, streets or highways which serve as corridors or links to property to be annexed may be annexed themselves without annexing the land adjoining the streets or highways. *Sullivan v. City of Omaha,* 183 Neb. 511.

This right of a city to annex streets and highways is not unlimited, however. After concluding that a city can annex highway right-of-way, the Court in Sullivan conditioned that right by saying that the area must be "of such character that the city had authority to include it."

In other words, the segment must be urban or suburban in character and not rural in character.

> " 'Rural' means of or pertaining to the country as distinguished from a city or town, whereas 'urban' means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes, but which tracts are, in fact, urban in character. It was clearly not the intention of the legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it." *Omaha Country Club v. City of Omaha*, 214 Neb. 3.

Further, the determination of the character of road right-of-way is made by analyzing the character of not just the annexed property itself, but also the surrounding area.

> "[I]t is the general character of the area annexed which characterizes the particular tracts involved in the annexation. . . . We hold that the character of a segment of an Interstate Highway sought to be annexed is to be determined from the areas immediately adjacent to the annexed portion." *Piester v. City of North Platte*, 198 Neb. 220.

There is no question that the subdivisions that were annexed are urban in character and that Pacific Street is a major urban throughfare [sic].

The land east of SIDs 210 and 230 and on the north side of Pacific Street is within

the municipal boundaries of the Village of Boys Town that is in agricultural use. The land east of SIDs 210 and 230 and on the south side of Pacific Street (the Marco property) is a vacant quarter section and is also currently in agricultural use. Boys Town is also used obviously for educational purposes and also includes residential development, recreation, commercial uses, and cultural uses. These areas abutting both the north and south sides of Pacific Street are, however, urban in character, even though they may be agricultural in use. It was therefore legal and proper for the City of Omaha to annex that portion of Pacific Street that is included herein.

In that regard the use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character. *Voss v. City of Grand Island,* 186 Neb. 232.

> "The term 'agricultural lands which are rural in character' clearly lends the inference that lands may be currently utilized in an agricultural fashion and still not be rural in character and meet the test of urban or surburban [sic] in character. . . . The statute does not prescribe, nor does reason dictate, that annexation must be blindly confined to land and areas that have already been zoned and developed into non-agricultural uses. . . . " *Voss,* supra.

8. The plaintiffs have not met their burden of proof. Ordinance No. 31294 is constitutional,

valid, and was enacted under lawful authority. The ordinance is not arbitrary, capricious, or unreasonable. The restraining orders entered on August 6, 1987, and on August 12, 1987, should be dissolved; the plaintiffs' request for temporary and permanent injunctions should be denied; and plaintiffs' second amended petition should be dismissed at plaintiffs' costs.

IT IS ALSO THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The restraining order entered August 6, 1987, is dissolved;

2. The restraining order entered August 12, 1987, is dissolved;

3. The plaintiffs' request for temporary and permanent injunctions are denied; and

4. The plaintiffs' second amended petition is dismissed at plaintiffs' costs.

Dated this 29th day of September, 1992.

BY THE COURT

/s/ Robert V. Burkhard
Judge

cc: James D. Sherrets
Charles K. Bunger
Lauren B. Hupp
Richard E. Croker

IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation; and RUTH FORBES, an Individual,	)	DOC. 862 No. 462
Plaintiffs,	)	
vs.	)	ORDER
THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR P. J. MORGAN, successor to MAYOR BERNIE SIMON; WALTER CALINGER; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; JAMES CLEARY; RICHARD TAKECHI; and AL DINZOLE, all as Council Members of the City of Omaha; and VICKIE EDWARDS, the Election Commissioner of Douglas County, Nebraska,	)	
Defendants,	)	
SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, a Public Corporation; and ROBERT L. VANVRANKEN, an Individual,	)	
Intervenors.	)	

This matter came on for hearing on September 25, 1990, on various matters. Arguments were made. Briefs were submitted on or about October 15, 17, 22, and 26, 1990; November 13, 20, 21, 27, 1990; and December 5, 1990. The Court now finds and ORDERS as follows:

1. Plaintiffs' motion to vacate order filed August 9, 1990, is sustained. The docket entry order of June 22, 1990, dismissing plaintiffs' amended petition as to defendant Vickie Edwards is vacated and set aside, because plaintiffs' counsel did not receive notice of the hearing.

2. The docket entry dismissal of August 14, 1990, was vacated and set aside on August 23, 1990.

3. The demurrer of defendant Vickie Edwards is sustained, and plaintiffs' amended petition is dismissed as to defendant Vickie Edwards.

4. There is no genuine issue as to any material fact, and the defendants' motion for partial summary judgment, filed September 14, 1990, is sustained to the extent that the plaintiffs do not have standing at this time to sue on the issue of voting rights.

Dated the 27th day of December, 1990.

BY THE COURT
/s/ Robert Burkhard
Judge

cc: James D. Sherrets
Charles K. Bunger
Denise Hill
Richard E. Croker

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

March 15, 1995

James D. Sherrets
SHERRETS SMITH LAW FIRM
260 Regency Parkway Dr., #200
Omaha, NE 68114

IN CASE OF: A-92-0965, Sanitary Improvement Dist. No. 210 of Douglas County v. City of Omaha

Pet Appellant for Further Review & Brf **filed** 01/19/95 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation; and RUTH FORBES and PAULA WEEKLEY, Individuals, Plaintiffs, vs. THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR P. J. MORGAN, successor to MAYOR BERNIE SIMON; STEVE EXON; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; LEE TERRY; RICHARD TAKECHI; and SUBBY ANZALDO, all as Council Members of the City of Omaha, Defendants, SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, a Public Corporation; and ROBERT L. VANVRANKEN, an Individual, Intervenors.	DOC. 862 NO. 462 SECOND AMENDED PETITION (Filed Jul. 11, 1991)

COME NOW the Plaintiffs, and for their cause of action against the defendant, allege and state as follows:

1. The plaintiff, Sanitary and Improvement District No. 210 (hereinafter referred to as "SID No. 210") is a body corporate and politic, organized and existing under and by virtue of the laws of the State of Nebraska and has

a population in excess of 1890 inhabitants and includes that area more particularly described in Ordinance No. 31294 (a certified copy of which is attached hereto and incorporated by this reference; hereinafter Exhibit "A"), exclusive of that area currently known as Piedmont also described therein.

2. Plaintiff Ruth Forbes, was a duly qualified elector and resident of SID No. 210; and owned real and personal property located within the boundaries of SID No. 210 at the time this action was originally filed. As such, she is an interested and aggrieved person within the meaning of 42 U.S.C. 1973c. This plaintiff brings this action for and on behalf of all persons similarly situated in SID No. 210. Plaintiff Paula Weekley is a resident, a property owner and a taxpayer within SID 210. As such, she is an interested and aggrieved person within the meaning of 42 U.S.C. 1973c. This plaintiff brings this action for and on behalf of all persons similarly situated in SID No. 210.

3. The defendant City of Omaha is a municipal corporation and a city of the metropolitan class, organized and existing under and by virtue of the constitution and laws of the State of Nebraska within Douglas County, and has a population of about 330,000.

4. That P.J. Morgan is the duly elected, qualified and acting Mayor of the defendant City of Omaha; all other named defendants are duly elected, qualified and acting Council members of the defendant City of Omaha.

5. Robert M. Spire was the duly elected, qualified and acting Attorney General for the State of Nebraska

and has been served with a copy of this Petition, pursuant to the requirements of the Neb. Rev. Stat. Section 25-21,159, at the time this action was filed.

6. On or about July 28, 1987, the City Council of the City of Omaha, at a regular meeting thereof, passed Ordinance No. 31294, providing for the annexation and merger of SID No. 210 into the City of Omaha; which ordinance was thereafter approved by the Mayor of the City of Omaha. Exhibit "A" is a true and correct copy of said ordinance, as adopted by the City Council and approved by Mayor Simon and purports to become effective fifteen (15) days after its passage or on or about August 13, 1987. The defendants have taken no action to repeal the ordinance and the defendants and each of them contend that the ordinance has been duly passed, and is a valid and subsisting ordinance of the City. Unless restrained and enjoined by this Court, the defendants will allow the ordinance to become effective and will enforce or cause the same to be enforced upon its effective date and the areas described therein will be considered and dealt with as a part of the City of Omaha. By virtue thereof and under the purported grant of authority of Neb. Rev. Stat. Section 31-763, the City will succeed [sic] to all the property and property rights of every kind, contracts, obligations and choses [sic] in action of every kind, held by or belonging to SID No. 210. At such time the residents and taxpayers of SID No. 210 will become voters, residents and taxpayers of the City of Omaha.

7. The property purporting to be annexed by said ordinance includes all territory located within SID No. 210.

8. Neb. Rev. Stat. Section 14-177, is the source of purported statutory authority pursuant to which Exhibit "A" was enacted. The statute is unconstitutional and void with respect to the plaintiffs herein, and all those similarly situated as residents, voters and taxpayers of SID No. 210. The statute operates to deny those persons and each of them due process of the law and equal protection of the law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States and Sections 1 and 3 of Article I of the Constitution of the State of Nebraska in the following respects:

(a) Section 14-117 fails to provide any standards by which the municipal officers of cities of the metropolitan class are to be guided or are to act in the passage of ordinances providing for the annexation of areas outside such city in the exercise of the power delegated to such officials by said statute; therefore, said statute constitutes an unlawful delegation of legislative authority which permits arbitrary, capricious and unreasonable action by said municipal officials, as is demonstrated by the adoption of Ordinance No. Exhibit A.

(b) Section 14-117 allows a city of the metropolitan class to annex territories, without priding [sic] for the consent or referendum by the residents of such territories, thereby subjecting the residents of the annexed areas to taxation without representation and to government carried out by officers they had no voice in choosing.

(c) Section 14-117 fails to provide for public hearings and notice of hearings as a prerequisite to annexation of any area by a city of the metropolitan class.

9. That Section 14-117 is further unconstitutional and void with respect to the plaintiffs herein, and all those similarly situated as residents, voters and taxpayers of SID No. 210 for reasons that it constitutes special and class legislation in contravention to Article III, Section 18 of the Constitution of the State of Nebraska. In that regard Neb. Rev. Stat. Section 16-120 requires annexing cities of the first class to provide benefits to the inhabitants of annexed areas which are substantially equal to those provided to other inhabitants of such city as soon as practicable. Said statute further requires adequate plans and necessary city council action to furnish such benefits within one (1) year of the annexation. The annexation powers granted to cities in the metropolitan class under Section 14-117 are not similarly accompanied by a statutory requirement to provide services or even plan for such services to inhabitants of annexed areas within a specified time. The inconsistency and omission constitutes an arbitrary, capricious and an unreasonable classification and further operates to deny to the residents, voters and taxpayers of SID No. 210 equal protection of the law in the exercise of such powers of annexation by the City of Omaha.

Further, although Section 14-117 purports to be without limitation in terms of its application to all cities of the metropolitan class, historically and traditionally it has been the practice and custom of the Nebraska legislature to increase the population standards by which cities are

classified in order that the City of Omaha is and remains the only city of the metropolitan class. By such repeated action the legislature has in effect closed the classification of cities of the metropolitan class, limiting the same and consequently the application of said statute to the City of Omaha alone contrary to Article III, Section 18.

10. SID No. 210 owns property, both in its governmental capacity and proprietary capacity. The property of the SID includes, but is not limited to, the following: a park, a system of sewage pipelines, several miles of streets, and miscellaneous other property. If the annexation ordinance becomes effective, all such property will be taken from SID No. 210 against its will and against the will of its residents, taxpayers, and electors, and against the will of the owners of real and personal property located within said SID. Further such taking would occur without compensation to the SID, its residents, taxpayers, electors, or owners of real and personal property located within the SID without any vote of the residents and electors of the SID. Any annexation of SID No. 210 by the City of Omaha would therefore deprive the SID of its property without due process of law, without the equal protection of the laws and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and Sections 1, 3, 16, 21 and 25 of Article I of the Constitution of the State of Nebraska.

11. If Ordinance No. 31294, and, therefore the annexation, becomes effective, it will also deny the plaintiff and all voters, taxpayers and residents of the SID, due process of law and equal protection of the laws, as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States and Sections 1 and 3 of

the Constitution of the State of Nebraska, in the following respects:

(a) The annexation ordinance is arbitrary, capricious and unreasonable and bears no reasonable relationship to the public welfare of the City of Omaha or of SID No. 210 or of the voters, taxpayers and residents thereof, and is not adopted in relation to any lawful or proper purposes;

(b) The annexation ordinance is further arbitrary, capricious and unreasonable in that: (i) the City of Omaha is unable to comply with or fulfill its obligation to pride [sic] police and fire protection, street maintenance, snow removal, sewer repair and maintenance, park maintenance, garbage pickup or other necessary or essential municipal services to the residents of SID No. 210; nor will the City be able to provide such services to the residents and property owners of SID No. 210 to the same extent as other residents and property owners of the City of Omaha; nor can such services be provided in accordance with the City's own requirements or parameters therefor; (ii) the City of Omaha will not nor can it effectively assert municipal regulatory or governmental jurisdiction over SID No. 210 as required by Section 14-117; (iii) such municipal services and facilities as the City may be able to pride [sic] to the residents of SID No. 210 will at best duplicate services already being provided to the residents of SID No. 210 more economically and more efficiently and would further reduce the level of services available to the present

residents of the City of Omaha by spreading the already sparse police and fire protection and maintenance services even further, placing greater burden with additional responsibilities on those services existing or reasonably contemplated to exist at the time of the annexation; (iv) the only effect of said annexation would be a substantial increase in the rate of taxes payable by property owners of SID No. 210 without any compensating benefits.

(c) The annexation ordinance is further arbitrary, capricious and unreasonable i [sic] that it is not based upon adequate findings to support or justify the action taken and was made without reasonable and impartial consideration of the ordinance by the City Council and in a manner contrary to and at variance with the procedures customarily followed in matters that come before it in a normal course of municipal business;

(d) The annexation ordinance is further arbitrary, capricious and unreasonable in that it fails to give the property-owners, voters, and residents affected by or interested in the annexation or the territory proposed to be annexed adequate notice thereof, opportunity to be heard with respect thereto, or opportunity to vote in connection therewith;

(e) The annexation ordinance is further arbitrary, capricious and unreasonable in that the sole purpose and motive behind the adoption of the annexation ordinance is to add valuable taxable property to the tax

rolls of the City of Omaha, and is for revenue purposes only. In support of the foregoing plaintiff states that: (i) in the past the Planning and Finance Departments of the City of Omaha have recommended that expenditures by SID no. 210 for certain park improvements be denied although such improvements conformed to the City's Park Master Plan for facility needs and had the previous approval of the Parks Advising Board solely because the approval of such improvements would have the effect of increasing the debt ratio of SID 210 ad [sic] Piedmont making the annexation thereof less desirable and causing a delay of the impending annexation thereof because of the corresponding debt burden which would have to be assumed by the City of Omaha; (ii) a new apartment complex has been constructed within the territorial limits of SID No. 210 with a valuation of approximately $3,000,000 which valuation is for the first time subject to tax levy in fiscal year 1988 and from which the City of Omaha will benefit directly if annexed with no corresponding benefit to the residents and taxpayers of SID No. 210; (iii) the annexation does not include and excludes land and improvements thereon abutting the existing boundaries of the City of which area is known as Boys Town for no good and valid reason solely because such property and improvements are not subject to taxation by the City of Omaha being owned by a religious and not-for-profit entity, yet over which the City of Omaha would be required to provide regulatory control,

jurisdiction and all municipal services, if annexed.

(f) The annexation ordinance is further arbitrary, capricious and unreasonable in that the adoption of the same is contrary to the City of Omaha's adopted and published standards and criteria for annexation.

(g) The annexation ordinance is further arbitrary, capricious and unreasonable in that it attempts to exclude property and improvements currently adjoining or abutting the existing territorial boundaries of the City of Omaha (Boys Town).

(h) The annexation ordinance is further arbitrary, capricious and unreasonable in that it attempts to effectuate annexation solely by extending the boundaries of the City of Omaha to form a common one with SID No. 210 by annexing a narrow and nonsubstantial strip of land over which the City neither has nor will provide any regulatory concern or control or adequate service or function and which land is distinguishable in type and character from that of SID No. 210.

For the foregoing reasons and each of them the ordinance to annex SID No. 210 is void and without force or effect.

12. The ordinance to annex SID No. 210 is further arbitrary, capricious, unreasonable and denies to Plaintiffs Ruth Forbes, Paula Weekley and all voters, taxpayers and residents of the SID equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States and the Constitution of the State of

Nebraska and is further contrary to the laws of the United States under 42 U.S.C. 1973c and the laws of the State of Nebraska for the following reasons:

Section 14-201.02 Neb. Revised Statutes provides in part:

> "The Legislature further finds and declares that fair and adequate representation of all areas and all segments of the population of cities of the metropolitan class is a matter of general statewide concern. . . . "
>
> For these reasons among others the Nebraska Legislature adopted Section 14-201.03 providing that the City of Omaha is to be divided into seven city council districts or compact and contiguous areas each equal or approximately equal in population. Such statute was enacted to protect the right to vote and to insure fair and adequate representation of all residents and voters of the City of Omaha.

If the ordinance is allowed to become effective, according to the Election Commissioner and at request of the City of Omaha, Ruth Forbes and all other voters, taxpayers and residents of the SID will be included within City Council District No. 6.

Prior to the effective date of annexation said district has a population of approximately 53,449 persons with approximately 34,486 registered voters. The approximate population and registered voters of all council districts, if the annexation ordinance is allowed to take effect, will be as follows:

Council District	Current Population	Registered Voters
1	46,151	21,637
2	44,898	17,944
3	44,893	20,034
4	45,183	22,824
5	54,695	30,042
6	56,949	34,486*
7	52,396	27,974

*Does not include registered voters of Piedmont or Wycliffe if annexation is effective.

The State of Nebraska has legislatively mandated that cities of the metropolitan class with a council form of government shall elect council members by district voting. Each council member shall be elected from a district in which he resides. Under such circumstances, the 14th Amendment to the United States Constitution, and 42 U.S.C. 1973c, and the laws of the Constitution of the State of Nebraska require that the weight of individual votes in such elections shall not be diluted, nor that individuals in any council constitution of the United States and the State of Nebraska as evidenced by the foregoing.

If the annexation ordinance is allowed to take effect the residents, voters and taxpayers of SID No. 210 will suffer and have denied to them a fair and equal vote in the formation of and government by the City Council of the City of Omaha and fair and adequate representation thereby to the extent of the foregoing and as further diluted by their inclusion into District No. 6. As a result of the annexation the dilution of the voting power and representation from District 6 to that of other districts is approximately as follows:

Council District	District Deviation by Population	District Deviation by Registered Voter
1	22.55%	159%
2	22.96%	192%
3	25.96%	172%
4	25.2 %	151%
5	3.4 %	115%
6	0.0 %	100%
7	7.3 %	123%

By population, such deviations include a dilution of: 22.5% from that of the median council district, 16.3% from that of the average council district; and 25.96% from the district having the least population. By voter registration the voters of the median council district have voting power and representation 1-1/2 times that of District 6. A quantitative analysis focusing on such deviations demonstrates that the same are impermissibly large in violation of the 14th Amendment to the Constitution of the United States, 42 U.S.C. 1973c, and of Articles I and III of the Constitution of the State of Nebraska and its laws.

13. The ordinance to annex SID No. 210 is further void for reasons that it attempts to effectuate the annexation by extending the boundaries of the City of Omaha to form a common one with SID No. 210 by the annexation of a non-substantial strip of land not similar in character to that of SID No. 210, neither urban in character nor over which the City has any regulatory concern or control nor for which the City will provide any substantial or adequate municipal service of function, all contrary to the requirements of Section 14-117.

14. The ordinance to annex SID No. 210 is further void for reasons that it attempts to annex some agricultural lands which are rural in character and a non-substantial strip of land which abuts agricultural land, rural in character, solely for the purpose of extending the borders of the City of Omaha in order to effectuate the annexation of SID No. 210, contrary to Section 14-117.

15. To permit the ordinance to become effective or to enforce the ordinance and to deal with the property described therein is part of the City of Omaha would subject the plaintiffs to legal burdens of a very serious consequence. Any such purported annexation of SID No. 210 would result in insurmountable and irrevocable damage to its citizens, electors, residents, property owners, and taxpayers. All such actions are detrimental to the plaintiffs, without authority of law and contrary to the Constitution of this State and the United States. Allowing the ordinance to become effective or to allow the ordinance to be enforced during the pendency of this suit would result in irreparable loss and damage beyond the power of redress by subsequent judicial proceedings and result in and cause a multiplicity of suits. Plaintiffs allege that they do not have a remedy at law as adequate, complete, speedy and as efficient as afforded by this court by the exercise of its powers in the Uniform Declaratory Judgment Act. That the enforcement of the ordinance purporting to annex, merge and consolidate the SID No. 210 with the City is not restrained or enjoined, SID No. 210, its residents, citizens, electors, property owners and taxpayers will be unable to protect themselves and save themselves by any other action or actions of law or actions of any kind and unless the enforcement

and the effectiveness of Exhibit "A" is restrained and enjoined, plaintiffs will be subject to the following legal burdens and damages among others:

(a) The annexation ordinance would raise questions as to the continued existence of SID No. 210;

(b) The annexation ordinance would raise questions relating to the ability of the SID to levy and collect taxes of any and all kinds;

(c) The annexation ordinance would raise questions as to the ability of the SID to interpret and contracts already entered into;

(d) The annexation ordinance would result in increased and excessive taxation to which the property of the plaintiffs will be subjected, as property within the limits of the City;

(e) The annexation ordinance would inconvenience, penalize and damage the plaintiffs for noncompliance with ordinance of the City, governing the use, care, maintenance, operation and improvement of property within the limits of the City;

(f) The annexation ordinance would inconvenience, damage and penalize the plaintiffs for noncompliance with ordinances of the City, governing the personal conduct and freedom of the plaintiffs;

(g) The annexation ordinance would raise questions concerning the power of the SID to issue, sell and deliver warrants and bonds of the SID;

(h) The annexation ordinance would raise questions as to the ability of the SID to impose taxes and/or special assessments;

(i) The annexation ordinance would create uncertainty as to the validity, construction, or propriety of the purported ordinance passed by the City;

(j) The annexation ordinance would result in jeopardizing the power of the district to make new and enforce already existing contracts;

(k) The annexation ordinance would result in providing uncertainty as to the power of the district to hold and conduct valid elections;

(l) The annexation ordinance would result in the lack of adequate police and fire protection;

(m) The annexation ordinance would result in the unlawful taking of property without justifiable and proper compensation;

(n) The annexation ordinance would result in denying to the residents, voters and taxpayers of SID No. 210 equal and therefore fair or adequate representation before City Council of the City of Omaha.

(o) The annexation ordinance would result in denying to the registered voters and residents of SID No. 210 rights equal to that of voters in City Council Districts One, Two, Three, Four, Five and Seven.

(p) The annexation ordinance would result in exposing the residents and taxpayers to

additional taxes to which they are not currently subject including without limitation: property taxes of the Transit Authority of the City of Omaha; motor vehicle registration taxes of the City of Omaha (wheel tax); and greater sales taxes.

WHEREFORE, plaintiffs pray as follows:

1. That this Court enter its judgment declaring Neb. Rev. Stat. Section 14-117 unconstitutional, unlawful, void and of no effect.

2. That the Court enter its judgment declaring the annexation ordinance set forth in Exhibit "A" to be unconstitutional, unlawful, void and of no effect;

3. Separately and apart from the relief prayed for above, that the Court stay the effectiveness of Ordinance No. 31294 until further order from the Court.

4. The Court enter its decree enjoining and restraining defendant City of Omaha, its agents, servants and employees, until further order of the Court from:

   (a) Assuming control and authority and exercising jurisdiction and domain as a municipal corporation over the territory or any part thereof comprising SID No. 210 as the defendant City of Omaha could or would do if allowed to put into force and effect the annexation ordinance;

   (b) Ousting from office or otherwise interfering with or molesting the duly elected, qualified and acting members

of the Board of Trustees of SID No. 210 in the exercise of their official duties;

(c) Taking possession of any public records of SID No. 210;

(d) Taking possession of and converting to its own use, or own use of the property, both real, personal and mixed, owned and possessed by SID No. 210; and

(e) Taking any steps or doing any act, the effect of which would be to abolish and destroy SID No. 210 and depriving it of its corporate rights and privileges or the effect of which will be to deny SID No. 210, its residents, electors, and taxpayers of the constitutional rights;

(f) Expending any tax funds collected or to be collected by the defendants from persons or property within the area purported to be annexed;

(g) Defining the boundaries of the City of Omaha so as to include within said boundary the territory or any part thereof comprising SID No. 210;

(5) That a restraining order and temporary and permanent injunction be issued accordingly and that the Court grant such other further relief as equity and justice may require;

(6) That the Court allow plaintiffs their cost and reasonable attorneys' fees.

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a corporation and RUTH FORBES and PAULA WEEKLEY, individuals, Plaintiffs,

By: /s/ James D. Sherrets
James D. Sherrets #15756
SHERRETS SMITH & GARDNER
260 Regency Parkway
Omaha, NE 68114
(402) 390-0404
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing instrument was sent by United States mail, postage prepaid to Charles K. Bunger, Assistant City Attorney, Suite 804, Omaha/Douglas Civic Center, Omaha, Nebraska 68183 on this 11 day of July, 1991.

/s/ James D. Sherrets

EXHIBIT A

ORDINANCE NO. 31294

AN ORDINANCE extending the limits of the City of Omaha over certain land in Douglas County, Nebraska, and incorporating the same into and making the same a part of the City of Omaha and to provide the effective date hereof.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF OMAHA:

Section 1. That the corporate limits of the City of Omaha be extended over and that there be included therein the following described lands in Douglas County, Nebraska, which presently adjoins the City Limits of the City of Omaha, as it now exists:

Beginning at a point on the existing City limit line of the City of Omaha, as established by Ordinance No. 28630, passed January 23, 1979, said point being 33 feet South of the Northeast corner of the Northwest quarter of the Northeast quarter of Section 26, Township 15 North, Range 11 East of the 6th P.M., Douglas County, Nebraska; thence West along a line 33 feet South of and parallel to the North line of said Northeast quarter, and the Northwest quarter of said Section 26, to a point on the East right-of-way line of 155th Street; thence Westerly to a point on the North line of Outlot 4, Pacific Hollow, an addition as surveyed, platted and recorded in said Douglas County, said point being 150.69 feet East of the Northwest corner of said Outlot 4, and 50 feet South of the North line of said Section 26; thence West along a line 50 feet South of and parallel to the North line of said Section 26 to a point on the West line of said

Section 26, said point also being the Northwest corner of Lot 5 said Pacific Hollow; thence North along the West line of said Section 26 to a point 33 feet South of the Northwest corner of said Section 26; thence West along a line 33 feet South of and parallel to the North line of Section 27, Township 15 North, Range 11 East of said 6th P.M., a distance of 50 feet to a point; thence North a distance of 33 feet to a point on the North line of said Section 27, said point also being 50 feet West of the Northeast corner of said Section 27; thence North to a point 50 feet North of and 50 feet West of the Southeast corner of Section 22, Township 15 North, Range 11 East of said 6th P.M., said point also being the Southeast corner of Lot 118 Fountain Hills, an addition as surveyed, platted and recorded in said Douglas County; thence North along a line 50 feet West of and parallel to the East line of said Section 22, to a point on the North line of said Section 22, said point also being 50 feet West of the Southeast corner of Section 15, Township 15 North, Range 11 East of said 6th P.M.; thence continuing North along a line 50 feet West of and parallel to the East line of said Section 15 a distance of 60 feet; thence East along a line 60 feet North of and parallel to the South line of said Section 15, a distance of 50 feet to the East line of said Section 15; thence East along a line 60 feet North of and parallel to the South line of Section 14, Township 15 North, Range 11 East of the said 6th P.M., to the East line of the West one half of said Section 14; thence South along said East line a distance of 60 feet to the Southeast corner of the West one half of said Section 14; thence South along the East line of the West one half of Section 23,

Township 15 North, Range 11 East of said 6th P.M., to a point 33 feet North of the Southeast corner of the West one half of said Section 23; thence East along a line 33 feet North of and parallel to the South line of said Section 23 to the West line of the Southeast quarter of the Southeast quarter of said Section 23; thence South along said West line a distance of 66 feet to the point of beginning.

A map of the area is attached hereto, marked "Exhibit A", and by this reference made a part of this Ordinance. The land to be annexed is marked thereon, but said map is for convenience and, in case of discrepancy, the description in this Section shall be controlling. The said territory upon the taking effect of this Ordinance shall be and become incorporated into, merged in, and be a part of the City of Omaha, Nebraska, and subject to the jurisdiction thereof and to its laws and ordinances.

Section 2. That this Ordinance shall be in full force and take effect fifteen (15) days from and after the date of its passage.

INTRODUCED BY
COUNCIL MEMBER

/s/ Fred Conley

PASSED JUL 28 1987 7-0

APPROVED BY:

/s/ Bernie Simon 7/30/87
MAYOR OF THE CITY
OF OMAHA DATE

ATTEST:

/s/ Mary Gulligan Corners
CITY CLERK OF THE
CITY OF OMAHA

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

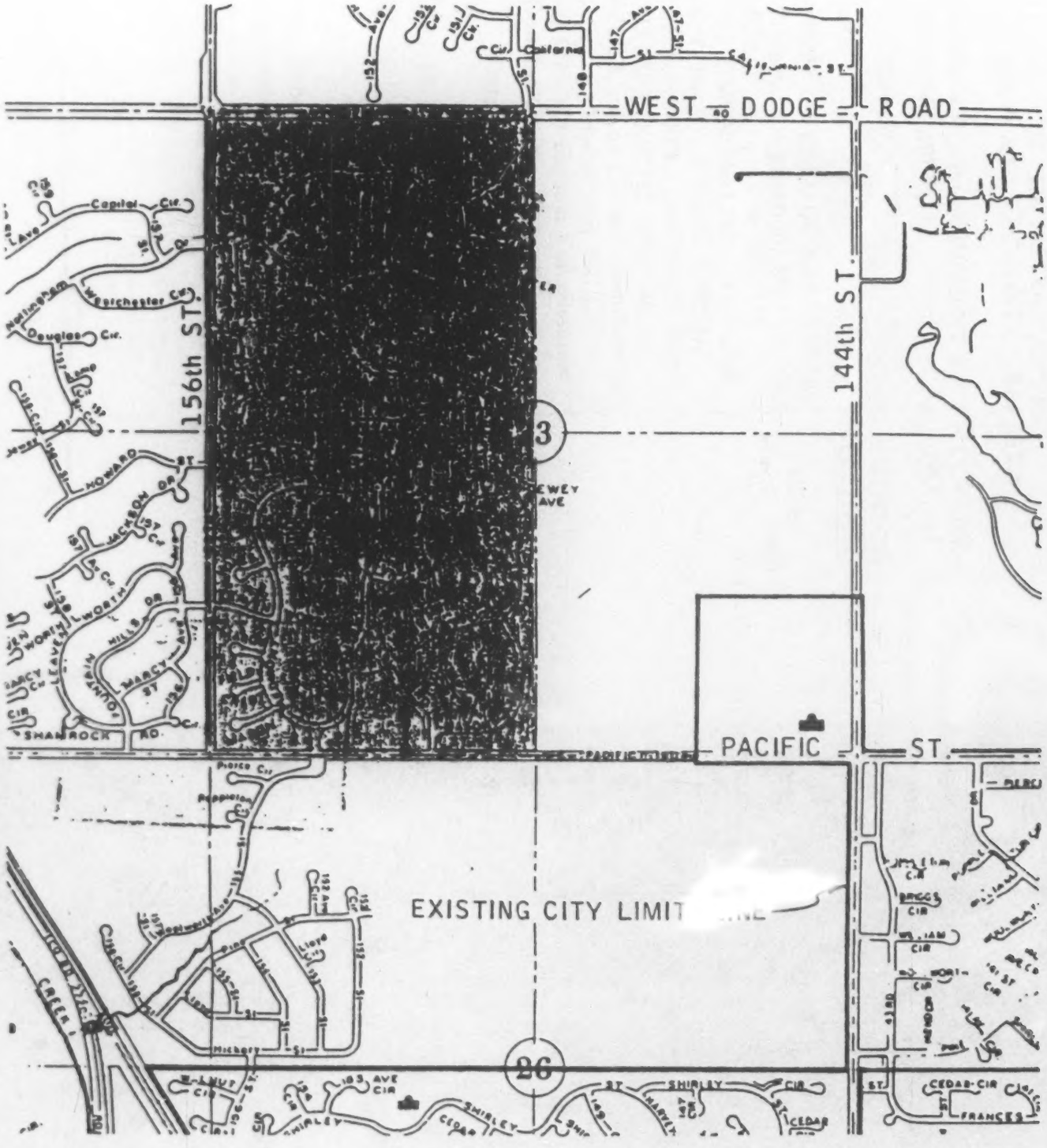
/s/ Mary Gulligan Corners
CITY CLERK

BY

APPROVED AS TO FORM: _____

/s/ Alley C. Marrow
ASSISTANT CITY
ATTORNEY

"EXHIBIT A"
WYCLIFFE & PIEDMONT
SIDs 210 & 230



POPULATION	3,150	TAXABLE VALUATION	$67,023,860
AREA	332 Acres	DEBT TO BE ASSUMED	$2,831,143
HOUSING UNITS	889 Single family 230 Multi-family	DEBT RATIO	4.22%

Scale: 1"-1,000' NORTH

Area to be Annexed is Shaded

omaha city planning department

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IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NUMBER 210,	)	DOC. 862 NO. 462
Plaintiff,	)	
v.	)	AMENDED PETITION
THE CITY OF OMAHA, NEBRASKA, A Municipal Corporation; MAYOR P.J. MORGAN, successor to MAYOR BERNIE SIMON; WALTER CALINGER; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; JAMES CLEARY; RICHARD TAKECHI; AND AL DINZOLE, all as Council Members of the City of Omaha; and VICKIE EDWARDS, the Election Commissioner of Douglas County, Nebraska,	)	(Filed May 3, 1990)
Defendants.	)	

COME NOW the plaintiffs, and for their cause of action against the defendant, allege and state as follows:

* * *

5. Robert M. Spire is the duly elected, qualified and acting Attorney General for the State of Nebraska and has been served with a copy of this Petition, pursuant to the requirements of the Neb. Rev. Stat. Section 24-21,159.

* * * *

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, A Corporation; and RUTH FORBES, An Individual, Plaintiffs, vs. THE CITY OF OMAHA, NEBRASKA, A Municipal Corporation; MAYOR BERNIE SIMON; WALTER CALINGER, FRED CONLEY; JOSEPH FRIEND, STEVE TOMASEK, JAMES CLEARY, RICHARD TAKECHI, and AL DINZOLE, all as Council Members of the City of Omaha, Defendants.	DOC. 862 NO. 462 PETITION Equity (Filed Aug. 6, 1987) Assigned to judge /s/ Burkhard

COME NOW the plaintiffs, and for their cause of action against the defendant, allege and state as follows:

* * *

5. Robert M. Spire is the duly elected, qualified and acting Attorney General for the State of Nebraska and has been served with a copy of this Petition, pursuant to the requirements of the Neb. Rev. Stat. Section 25-21,159.

* * *

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation; and RUTH FORBES, an Individual, Plaintiffs, vs. THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR BERNIE SIMON, WALTER CALINGER, FRED CONLEY, JOSEPH FRIEND, STEVE TOMASEK, JAMES CLEARY, RICHARD TAKECHI, and AL DINZOLE, all as Council Members of the City of Omaha, Defendants. SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, a Public Corporation; and ROBERT L. VANVRANKEN, an Individual, Intervenors.	DOC. 862 NO. 462 ANSWER TO PLAINTIFFS' PETITION (Filed Feb. 7, 1990)

COME NOW the Defendants, and for their Answer to the Plaintiffs' Petition, state as follows:

1. Defendants admit the allegations contained in paragraphs 3, 4, 5, 6, and 7 of Plaintiffs' Petition.

2. Defendants deny the allegations contained in paragraphs 1, 2, 8, 9, 10, 11, 12, 13, 14, and 15 of Plaintiffs' Petition.

3. Defendants deny each and every other allegation contained in Plaintiffs' Petition except those admissions against the interests of Plaintiffs.

4. By way of affirmative defense, Defendants allege that the Plaintiffs, and each of them, lack standing to bring this action.

5. By way of affirmative defense, Defendants allege that the Plaintiffs have failed to include necessary parties.

6. By way of affirmative defense Defendants allege that the Defendants are not the proper parties defendant with regard to the allegations contained in paragraph 12 of Plaintiffs' Petition.

WHEREFORE, the Defendants pray to the Court for an order dismissing the Plaintiffs' Petition and confirming this annexation, and for such other and further relief as to the Court may seem just and equitable.

THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation, et al., Defendants,

By /s/ Ken Bunger
CHARLES K. BUNGER,
No. 10504
Assistant City Attorney
804 Omaha/Douglas
Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
Telephone: 402/444-5115

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ANSWER TO PLAINTIFFS' PETITION was sent by regular United States mail, postage prepaid, on this 5th day of February, 1990, to James D. Sherrets, SHERRETS & SMITH, 101 South 108th Ave., Omaha, Nebraska 68154, and Richard E. Croker, Croker, Huck & McReynolds, Suite 1250, Commercial Federal Tower, 2120 South 72nd Street, Omaha, Nebraska 68124.

/s/ Ken Bunger

92-965

IN THE DISTRICT COURT OF NEBRASKA,
IN AND FOR DOUGLAS COUNTY.

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation; and RUTH FORBES and PAULA WEEKLEY, Individuals, Plaintiffs, -v- THE CITY OF OMAHA, et al., Defendants, and SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, A Public Corporation; and ROBERT L. VANVRANKEN, an Individual, Intervenors.	Doc. 862 No 462 BILL OF EXCEPTIONS: Volume I: Testimony, (Pages 1 to 262) (Filed Nov. 6, 1992)

Heard before the HONORABLE ROBERT V. BURKHARD, JUDGE, at Omaha, Nebraska, on December 2, 3, 4, 5, 1991, and February 26, 1992.

APPEARANCES

MR. JAMES D. SHERRETS and MR. KARL D. VOGT,	on behalf of the Plaintiffs;
MR. CHARLES K. BUNGER and MS. MARY M. ELLISTON,	on behalf of the City of Omaha, et al., Defendants;
MS. LAUREN BECKER HUPP,	on behalf of the Intervenors.

Lewellyn F. Nelson
Official Court Reporter
Omaha, Nebraska

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* * *

[p. 43] BY MR. SHERRETS:

Q. Was there also a concern expressed by members of the SID 210 Board and the residents of these two meetings about the size and shape and numbers of the voting districts for City of Omaha council districts?

A. Yes, there was. The districts seemed to be extremely –

MR. BUNGER: I'll object again, relevance on this whole issue. It's no longer an issue in this case.

THE COURT: We've had a number of hearings.

MR. SHERRETS: Your Honor, the plaintiffs will concede –

THE COURT: A summary judgment, or I don't know what that was –

MR. BUNGER: Demurrer and summary judgment.

THE COURT: – on the voting rights issue.

MR. SHERRETS: The Court did grant summary judgment on the voting rights issue.

[p. 44] THE COURT: It was dismissed as to Defendant Vickie Edwards.

MR. SHERRETS: The election commissioner?

THE COURT: Right.

MR. SHERRETS: Yes.

MR. BUNGER: A partial summary judgment.

MR. SHERRETS: I'm offering some testimony today, Your Honor, as to the imbalance in the voting districts at the time of the annexation and the continued imbalance that will occur even with some realignment of the districts as a result of this annexation.

In view of the Court's previous rulings, if the Court sustains the objection, then I'll make it by offer of proof.

THE COURT: Well, there is an objection, I assume.

MR. BUNGER: Yes, Your Honor.

THE COURT: All right, I'll sustain the objection. You can go ahead with any offer of proof, if you want, at this point.

MR. SHERRETS: All right. The offer of proof would be if permitted to so testify, the evidence would be

that at the time of annexation the City of Omaha council districts were out of balance at a range that was between 20 and 30 percent, in that the districts to the east were underpopulated compared to the districts to the west; [p. 45] and those districts, which were 210 and 230, would be attached to.

In addition, there has been a realignment of the council districts since that time, but this annexation will put them out of balance once again, in that some 4,000 residents will be added to council districts that contain approximately 40,000 people each. And, as a result once again, a violation of due process and equal protection will occur in that this annexation, if allowed to go forward, will permit and continue an imbalance that has existed in the past.

And, further, that the past pattern of practice of both the City and the Election Commissioner will show that they will not make any adjustment in the council districts no matter how many annexations occur until 2001 when they have yet another census.

For all those reasons, the evidence will show that again a denial of equal protection will occur.

The offer of proof will also take the form of an affidavit from a Professor James Johnson, who has a Ph.D. in Political Science from Northwestern University and who is currently on the faculty at the University of Nebraska at Omaha.

And I believe the City agreed I could save the expense of bringing him down here and paying him anything to sit [p. 46] around and, instead, could offer his

affidavit without a hearsay or foundation objection but again subject to his relevancy objection.

Is that correct, Mr. Bunger?

MR. BUNGER: I have no objection as to the affidavit as to what he would testify to. We may have objections both as to foundation and hearsay as to the substantive matters within the affidavit, but there is no objection that this is the testimony he would offer if called in person to testify.

I do object to the previous offer of proof as being more argument than offer of proof.

And, secondly, with regard to the offer of proof, it is an issue that has already been ruled on in the summary judgment. I would object to any offer of proof at this time.

THE COURT: I'll let the offer of proof stand for the record; so it will be in the record in any event.

Is this going to be marked?

MR. SHERRETS: Yes, Your Honor, I would like to mark it right now.

– Exhibit Number 21 marked for identification by the court reporter –

MR. SHERRETS: The offer of proof would include Exhibit 21, which is the affidavit from James Johnson that [p. 47] was referred to, Your Honor. And, again, the City stipulation that I need not produce him in person in order to make this offer of proof. Is that correct, Mr. Bunger?

MR. BUNGER: That is correct.

THE COURT: But you are objecting to the affidavit being received in evidence?

MR. BUNGER: Yes. We object as to foundation and hearsay.

MR. SHERRETS: And if I haven't said so, I'll offer Exhibit 21.

MR. BUNGER: And relevance.

THE COURT: All right I'll sustain the objection on 21.

* * *

IN THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

SANITARY AND IMPROVEMENT DISTRICT NO. 210 OF DOUGLAS COUNTY, NEBRASKA, a Corporation; and RUTH FORBES, an Individual,	)	DOC. 862 NO. 462
vs.	)	AFFIDAVIT
THE CITY OF OMAHA, NEBRASKA, a Municipal Corporation; MAYOR P. J. MORGAN, successor to MAYOR BERNIE SIMON; WALTER CALINGER; FRED CONLEY; JOSEPH FRIEND; STEVE TOMASEK; JAMES CLEARY; RICHARD TAKECHI; and AL DINZOLE, all as Council Members of the City of Omaha;	)	
Defendants,	)	
SANITARY AND IMPROVEMENT DISTRICT NO. 230 OF DOUGLAS COUNTY, NEBRASKA, a Public Corporation; and ROBERT L. VANVRANKEN, an Individual,	)	
Intervenors.	)	

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

Being first duly sworn upon oath the undersigned states as follows:

1. My name is James B. Johnson, Ph.D.

2. I have a Ph.D. in Political Science from the Northwestern University which was obtained in 1972 and I am personally familiar with the matters set forth in this affidavit and believe them verily to be true.

3. Prior to the most recent redistricting done several months ago the population counts for the various city council districts are out of proportion by approximately 30% when comparing the eastern districts to District 6 and 7 which are on the west central and southwest boundaries of the City of Omaha. (Exhibit "A")

4. Upon annexation, the council district that Wycliffe and Piedmont are included in will become 10% greater in size. Following past patterns and practices, the citizens of the Subdivisions located at 156th and West Dodge Road would in all probability be added to District 6 or 7 causing a voting population disparity. Even if added to the northwestern district, it too would bear a substantial disparity in population compared to the eastern most districts for city council districts.

5. The substantial disparities referred to above dilute, water down, and diminish the voting strength and voting rights, in violation of the Nebraska and Federal Constitutions and applicable Federal Voting Right Acts.

6. The election commissioner as of the signing of this Affidavit continues to fail to adjust the voting districts in a timely manner to provide for their equalization based on population.

7. Based on my training and experience I am of the opinion that the disparity in question may tend to discourage voters in districts that have diluted voting

strength; they are disenfranchised and those who represent them are disproportionately burdened by the additional constituents relative to their counterparts representing other council districts.

FURTHER affiant sayeth not.

DATED this 29 day of November, 1991.

/s/ James Johnson, Ph.D.
James Johnson, Ph.D.

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

Sworn and subscribed to before me this 29th day of November, 1991 by James Johnson.

GENERAL NOTARY-
State of Nebraska
KATHY NEMECEK
My Comm. Exp. Dec. 26, 1994

/s/ Kathy Nemecek
Notary Public

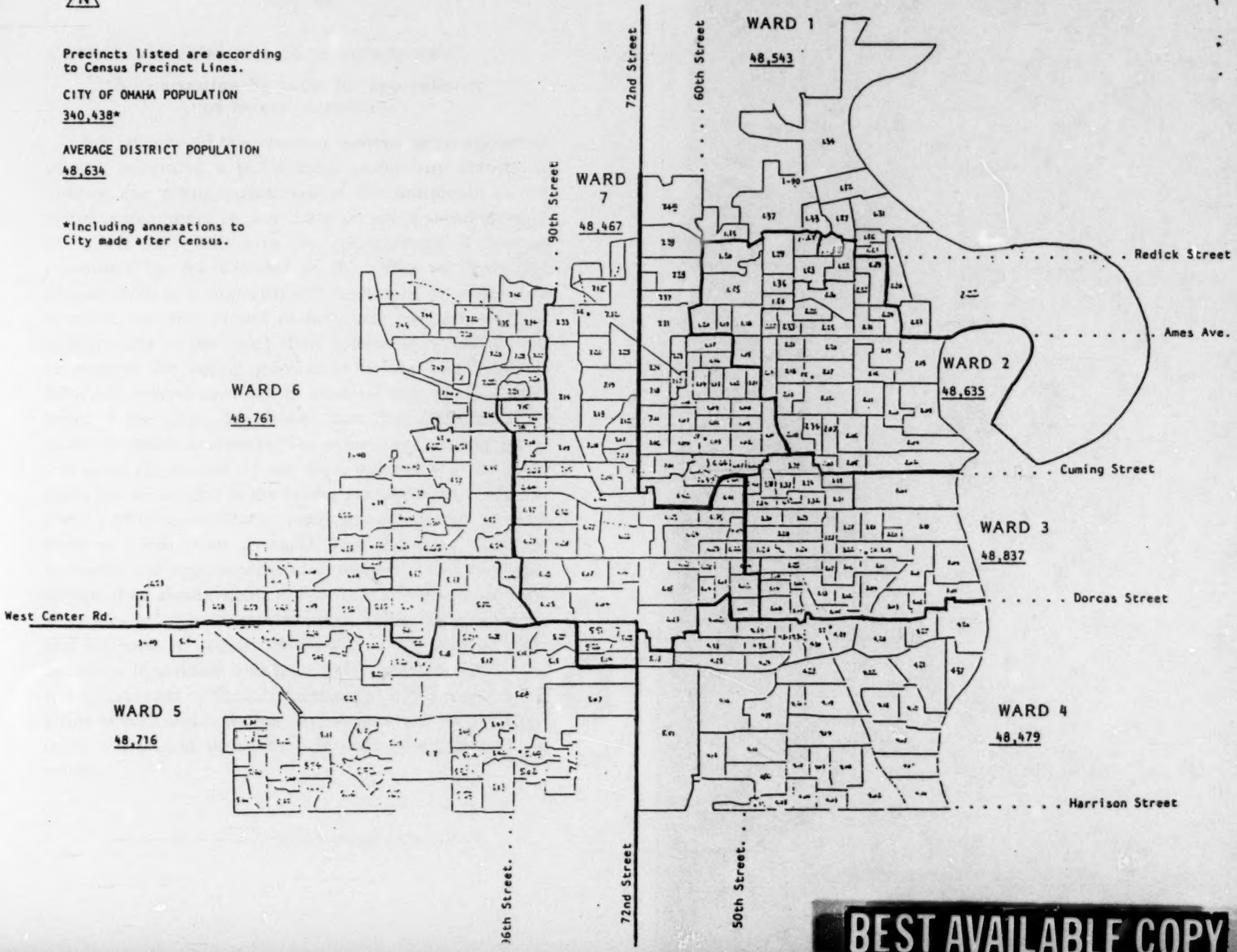
N

Precincts listed are according to Census Precinct Lines.

CITY OF OMAHA POPULATION
340,438*

AVERAGE DISTRICT POPULATION
48,634

*Including annexations to City made after Census.



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§ 1973a. Proceeding to enforce right to vote

Authorization by court for appointment of federal examiners

(a) Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the Director of the Office of Personnel Management in accordance with section 1973d of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided,* That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.